

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

DEFOE CORPORATION,  
Employer

and

Case 29--RC--11107

THE SHEET ASPHALT WORKERS LOCAL  
UNION 1018 OF THE DISTRICT COUNCIL  
OF PAVERS AND ROAD BUILDERS OF THE  
LABORER'S INTERNATIONAL UNION  
OF NORTH AMERICA,  
Petitioner

and

UNITED PLANT AND PRODUCTION  
WORKERS, LOCAL 175, INTERNATIONAL  
UNION OF JOURNEYMAN AND  
ALLIED TRADES,  
Intervenor

*Eric Boerschinger, Esq.*, for the Regional Director.  
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of New York, New York, for the Intervenor.

RECOMMENDED DECISION AND ORDER ON CHALLENGES

MICHAEL A. ROSAS, Administrative Law Judge. Pursuant to a notice of hearing on objections to election and challenged ballots issued by the Regional Director for Region 29 on October 25, and Order Rescheduling Hearing, dated November 9, 2006, I conducted a hearing on this matter on December 7, 8, and 12, 2006, in Brooklyn, New York. Based on the evidence submitted in that hearing, including the testimony of the witnesses and my assessment of their demeanor, as well as closing statements by counsel, I make the following findings and conclusions.

In accordance with a stipulated election agreement signed by Local 1018, Local 175, and Employer DeFoe Corporation (DeFoe Corporation), and approved by the Acting Regional Director for Region 29 on August 1, 2005, an election was conducted on August 31, 2006, in the following unit:

All full-time and regular part-time workers who primarily perform asphalt paving, including foremen, rakers, screenmen, micro pavers, AC paintmen, liquid tar workers, landscape planting and maintenance/fence installers, play equipment/safety surface installers, slurry/seal coaters, shovelers, line striping installers, and small equipment operators employed by the Employer, who work primarily in the five boroughs of New York City, but excluding all employees who primarily perform the laying of concrete, concrete curb setting work, or block work, and/or who are currently represented by Highway, Road and Street Construction Laborers, Local Union 1010 of the District Council of Pavers and Road Builders, Laborers International Union of North America, or by Highway, Road and Street Construction Laborers, a Division of Amalgamated Local Union 450A, and excluding clerical employees, guards, and supervisors as defined in Section 2(11) of the Act.

The election resulted in a tie—one vote for Petitioner (Local 1018) and one vote for Intervenor (Local 175). There were no void or challenged ballots. On September 7, 2006, however, Local 1018 and Local 175 filed timely objections to conduct affecting the results of the election. Local 1018's objection alleged that Local 175 held a captive audience meeting within 24 hours of the election and, at that meeting, its representatives threatened, coerced, and misinformed members to vote in favor of Local 175. Local 175 filed seven objections. Its first, second, third, fourth, fifth, and sixth objections alleged that Local 1018 threatened to "blackball" employees who supported Local 175, demanded during the critical period prior to the election that Employer DeFoe, among others, dismiss any employee not a member of Local 1018, and threatened employees with expulsion, loss of employment, and loss of benefits if they supported Local 175. Local 175's seventh objection alleged that Employer DeFoe threatened employees that they would be fired if they voted for Local 175.

Pursuant to Section 102.69 of the Board's Rules and Regulations, the Acting Regional Director caused an investigation to be conducted concerning the parties' objections and afforded the parties full opportunity to submit evidence bearing on the issues. After conducting an investigation and considering the proof offered by the parties, the Acting Regional Director recommended overruling 1018's objection and Local 175's first, second, third, fourth, fifth, and sixth objections. He found, however, that Local 175's seventh objection, which Employer DeFoe denied, raised material and substantial issues of fact and credibility requiring a hearing before a hearing officer. Accordingly, the Acting Regional Director also directed that the hearing officer's report contain resolutions of credibility of witnesses, findings of fact, and recommendations to the Board.

## The Objection

As the proponent of the election objection, Local 175 has the burden of proving that the conduct complained of had the tendency to interfere with the employees' freedom of choice. *Double J. Services*, 347 NLRB No. 58, slip op. at 1–2 (2006). That burden is a heavy one because there is a strong presumption that ballots cast under Board rules and supervision reflect the true desires of the electorate. See *Safeway, Inc.*, 338 NLRB 525 (2002), and cases there cited.

In its offer of proof submitted to the Acting Regional Director, Local 175 asserted that “named employees will testify that a few days before the election, representatives of Employer DeFoe threatened employees while they were at work that they would be fired if they voted for Local 175.” As Employer DeFoe’s alleged conduct occurred “within the critical period prior to the election,” if true, it would warrant setting aside the election. See Regional Director’s Report on Objections and Notice of Hearing, p. 20.

Local 175 called two witnesses—Keith Waterbury and Roland Bedwell. Neither Employer DeFoe nor Local 1018 called witnesses. Waterbury, a labor foreman employed by the DeFoe Corporation for the past 7 years, voted at the election on August 31, 2006. He testified that, prior to the election, he received literature from Employer DeFoe indicating that the General Contractor’s Association was not recognizing Local 175. However, Waterbury denied having any discussions with any of Employer DeFoe’s supervisors prior to the election. He was approached by a Local 1018 representative named “Todd”, but their discussion focused generally on the future of Local 1018 and concluded with a statement by Todd that he looked forward to speaking with Waterbury in the future. (Tr. 72–81.) Waterbury also testified that he spoke to Roland Bedwell just before entering to vote in the election. However, he could not recall the details of this conversation beyond simply “shooting the breeze.” (Tr. 83–84.) They also spoke the following day at Local 175’s office. At that time, Bedwell asked Waterbury why he did not vote in favor of Local 175. Waterbury responded that he chose “to stay in International for my well being.” (Tr. 86–88.)

Bedwell’s testimony corroborated Waterbury’s testimony regarding that they had conversations before and after the election. Their conversation before the election did not indicate that Waterbury was threatened in any way. However, in their conversation on September 1, Waterbury told Bedwell that he voted in favor of Local 1018 because he was approached by “someone” and told that, if he voted in favor of Local 175, he would be discharged and his employer could lose its contract. (Tr. 92–93.) They also spoke again about 6 to 8 weeks later. Bedwell testified that Waterbury informed him then about an “indication” from Employer DeFoe that he would lose his job and the Company would lose its contract if employees voted in favor of Local 175. However, he conceded that Waterbury did not attribute this threat to any particular person or entity. (Tr. 94–95.)

I found Bedwell more credible than Waterbury. Waterbury’s testimony was guarded, inconsistent, and conveyed a general reluctance to recall the details of any of the conversations that he had regarding the election on August 31. That stated, Bedwell’s testimony regarding his conversations with Waterbury failed to reveal the

source of the alleged threats. Therefore, there is no credible evidence attributing the alleged threats to any supervisor or agent of Employer DeFoe. Under the circumstances, I find that Local 175 has not met its burden of showing that Employer DeFoe engaged in conduct that tended to interfere with employees' free choice.

Accordingly, I overrule Objection 7.

#### Conclusions and Recommended Order

In accordance with the above findings, I conclude that the Objections of Employer DeFoe to the election held on August 31, 2006, have no merit and that the election was valid. I hereby recommend that those Objections be overruled in their entirety. The case is remanded to the Regional Director for Region 29 to process the matter in accordance with this recommended decision and to issue an appropriate certification.<sup>1</sup>

Dated, Washington, D.C. January 16, 2007

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Michael A. Rosas  
Administrative Law Judge

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<sup>1</sup> Pursuant to the provisions of Section 102.69 of the Board's Rules and Regulations, within 14 days from the date of the issuance of this recommended decision and order, either party may file with the Board in Washington, D.C., an original and eight copies of exceptions thereto. Immediately upon filing such exceptions, the party filing them shall serve a copy upon the other parties and a copy with the Regional Director. If no exceptions are filed to this decision and order, the Board may adopt the decision and order as its own.